

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDRIC PIPES,

Defendant-Appellant.

UNPUBLISHED

May 31, 2005

No. 247718

Wayne Circuit Court

LC No. 02-005202-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIAN DALE KEY,

Defendant-Appellant.

No. 247719

Wayne Circuit Court

LC No. 02-005202-01

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

In this consolidated case, defendants Cedric Pipes and Julian Key appeal as of right their jury trial convictions of first-degree premeditated murder, in violation of MCL 750.316(1)(a). We reverse and remand for new trials.

This case arises out of the tragic drive-by shooting death of three-year old Destiney Thomas on March 23, 2002. The prosecution's theory of the case was that Destiney was the innocent victim of a dispute over drug territory between defendants and Jackie Close and Eddie Smith. Close and Smith were friends with Terrell Brown, the boyfriend of Deneen Thomas, Destiney's mother. After Smith and Brown got into an argument with defendants, the green Jeep Cherokee that defendant Key was known to drive was fired upon and damaged while it was parked in front of the home of defendant Key's mother. Defendants saw a car that resembled Close's vehicle drive away shortly after the shots were fired. The prosecution maintained that defendants retaliated against Close and Smith: defendants and some friends drove in two separate vehicles, one of which was the green Jeep Cherokee, to Brown's house, where they

believed they would find Close and Smith. Gunshots were fired from one or both vehicles, and some of the bullets penetrated the house, striking and killing Destiney.

Deneen Thomas, Destiney's mother, testified that she lived at Brown's house. Close and Smith were both at Brown's house the day before the shooting. Smith and Sean Taylor were both at the house at the time of the shooting. Thomas hit the floor when the gunfire started, and although many shots were fired, she was unable to discern from which direction they came. After the gunfire stopped, Thomas found Destiney in a pool of blood in the room where she had been playing. The medical examiner testified that Destiney died as a result of a gunshot wound to the head.

Terrell Brown was friends with defendant Key. Brown testified that there was some animosity between himself and defendant Pipes. At the time of the shooting, Brown was on the front porch; Smith was present, and Taylor was approaching the house. Just before the shooting started, Brown saw a car drive past the house. A green Jeep Cherokee then pulled up and stopped. Brown heard gunshots and dove into the house. Brown testified that the Jeep looked like the vehicle defendant Key was known to drive. According to Brown, the gunshots were fired from the passenger side of the Jeep. Brown heard Thomas scream and ran upstairs, where he saw Destiney on the floor. From a window, Brown saw the Jeep speed off after the shooting; however, he was unable to see who was in the Jeep.

Brown testified that approximately four days after the shooting, he gave the police defendant Key's name as the person in the Jeep, because he knew Key was known to drive the Jeep, and therefore blamed the shooting on him. Brown only identified defendant Key as the shooter because of the Jeep, did not actually see who was in the Jeep, and admitted lying to the police about seeing the driver of the Jeep. Brown did not give the police defendant Key's name as a suspect until several days following the shooting because he planned on "getting even" and "dealing with" the situation himself. Brown later told the police that he could not identify the shooter, and did not know if defendant Key was in the Jeep at the time of the shooting. After the shooting, Brown learned about a dispute between defendant Key and Close and Smith, which he relayed to the police. Brown thought he probably gave the name of defendant Pipes to the police. Brown believed the gun used in the shooting was an AK-47 by the way the shots were fired.

Terrence Mitchell, Close's brother, testified that he knew that defendants were friends and that defendant Key was known to drive a green Jeep Cherokee. At the time of the shooting, Mitchell was about one block away from Brown's house, when he heard gunfire. After it stopped, he saw a green Jeep Cherokee coming toward him at a "kind of fast" pace. Mitchell testified that when he was approximately ten to twelve feet from the Jeep, he saw defendant Pipes driving the vehicle, and defendant Key in the passenger seat; he did not see another car in the area besides the Jeep. Mitchell testified that he gave a statement to the police shortly after the incident, but believed that certain information was added by the police, including information about a small white car that was in the area. Mitchell claimed that he was forced to sign the inaccurate statement.

Before trial, Mitchell was required to testify pursuant to an investigative subpoena. He denied testifying at that proceeding that he saw a white car that appeared to be traveling with the Jeep, despite what the transcript stated. Mitchell also denied that he previously testified that two

people were in the white car, including the passenger, who he knew by the name of Pierre; Mitchell claimed that the prosecutor or the court reporter fabricated such information.

Djuana Smith, defendant Key's girlfriend at the time of the shooting, owned a green Jeep Cherokee, and often allowed defendant Key to drive her vehicle. While Djuana was out of town, defendant Key borrowed the Jeep. She asked him to return it several times, but despite his assurances, defendant Key failed to do so. Defendant Key ultimately admitted that the Jeep was damaged by gunshots while it had been parked in front of his mother's home. Defendant Key told her that he did not know who fired the shots, but that it might have been someone with whom he had been in an argument. When Djuana eventually received the Jeep back, the rear window on the driver's side was shot out, and there were two or three bullet holes in it.

Casings collected from the street outside Brown's house were .30 caliber, and were all fired from the same weapon. Bullet fragments collected at the scene were also the same caliber as the casings, but it could not be determined if the bullets came from the same weapon as the casings. Ammunition of the type found at the scene is typically used in an AK-47 or SKS-type weapon. A bullet recovered from inside the wall of the Jeep was .45 caliber and possibly fired from another gun. The police found gun shot residue in at least one area of the Jeep, but the quantity of residue particles was insufficient to meet reporting standards to confirm the presence of gunshot residue. As a result, the forensic chemist was unable to determine if a gun was discharged or fired from inside the Jeep.

A fingerprint found on the top of the glass on the front passenger door outside the Jeep was a match to defendant Pipes' fingerprint. The position of the fingerprint on the glass was as if someone inside the vehicle extended his fingers over the top of the glass onto the outside of the vehicle.

Sean Taylor was unavailable as a witness, so his prior testimony was read to the jury. Taylor was friends with Brown, and was at Brown's house at the time of the shooting. Taylor did not know defendants. Before the shooting started, Taylor saw a small blue car drive by with a green Jeep Cherokee behind it. When the shooting began, Taylor ran into the back alley. Although he did not see any shots fired, he testified that the shots came from the blue car. Just before he ran away, Taylor saw a gun hanging out of the passenger side window of the blue car. He did not see anything hanging out of the windows of the Jeep. Taylor was unable to see the shooter in the blue car, but gave a partial description to the police.

Multiple statements from each defendant were admitted into evidence at trial. The trial court instructed the jury that each statement should only be considered against the defendant who made the statement, and not against the codefendant.

Defendant Key was arrested on March 26, 2002. After being advised of his constitutional rights, defendant Key signed a form acknowledging his rights and agreed to give a statement. Defendant Key was asked a series of questions, and a police officer wrote down his answers. After reviewing the statement and making some changes, defendant Key signed each page of the statement. Defendant Key admitted driving Djuana's Jeep on March 22, 2002, with defendant Pipes and Damon Clark. According to defendant Key, defendant Pipes got into an argument with Close and Smith about their drug territory. Later that day, defendant Key saw the Jeep get hit with five or six rounds of gunfire, and saw a car that resembled Close's vehicle leaving the

scene—Close and Smith had been driving the same car earlier that day. Defendants Key and Pipes discussed seeking revenge against Close and Smith for shooting at the Jeep. According to defendant Key, defendant Pipes rented a car and drove it past Brown's house—defendant Pipes shot at the house with a nine-millimeter gun, and Clark used an "AK." Another man, Pierre, followed them in the Jeep.

On March 27, 2002, defendant Key agreed to give another statement after being advised of his rights. Defendant Key initially denied that he fired any shots at the house or that he knew who fired the shots. He also denied being in the Jeep or having any participation in the shooting. Defendant Key then admitted that he was involved in the shooting. Defendant Key explained that he and defendant Pipes had gotten into an argument with Close and Smith over their respective drug territories. After someone fired shots at his girlfriend's Jeep, defendant Key and some friends borrowed a car for a few hours. Defendant Key admitted that he and defendant Pipes were in the rental car, and fired several shots at Brown's house in retaliation, in an attempt to harm Smith. Their other friends followed in the Jeep to act as backup. Defendant Key appeared to admit that he used an AK-47.

On March 26, 2002, defendant Pipes was advised of and acknowledged his constitutional rights and agreed to talk about the shooting, although he was not under arrest at that time. Defendant Pipes admitted spending the day before the shooting with defendant Key. He recounted an incident with Smith and stated that the Jeep belonging to defendant Key's girlfriend had been damaged by gunfire. According to defendant Pipes, defendant Key told him that Close and Smith were the perpetrators. Defendant Key then made threats to "get" Smith, and stated that he was going to kill Smith. Following the shooting, defendant Key told defendant Pipes that he was trying to shoot Smith, and that he did not intend to shoot the little girl. According to defendant Pipes, a man named "Pierre" was with defendant Key—Pierre drove the Jeep, and either defendant Key or Pierre shot at the house from the vehicle.

On March 27, 2002, defendant Pipes again acknowledged his rights and agreed to give a statement. Defendant Pipes gave an oral statement, which was recorded by the police. Defendant Pipes refused to sign the written statement, but, over objection, the trial court admitted the statement. Defendant Pipes recounted that after defendant Key discovered that Smith was responsible for shooting the Jeep, defendant Key was "ready to go get" Smith. Defendant Pipes obtained a rental car, which defendant Key drove with Marcus to Brown's house. Defendant Pipes followed in the Jeep with Damon. Defendant Pipes abruptly ended the interview at that point.

On March 28, 2002, defendant Pipes gave yet another statement after being advised of his constitutional rights. Defendant Pipes recalled that on the day of the shooting, defendant Key told him that Smith shot up the Jeep, and that he knew where Smith could be found. Defendant Key asked defendant Pipes if he could borrow a car from someone so that defendant Key could kill Smith. Defendant Pipes provided defendant Key with a rental car, and defendant Pipes drove the Jeep. According to defendant Pipes, defendant Key and "Marcus" shot at the house. Defendant Key used a nine-millimeter gun, and Marcus used a rifle. Defendant Pipes denied firing any shots, but admitted to providing the car for defendant Key.

At the close of the prosecution's case, both defendants were unsure if they would testify, despite the fact that the trial court made its earlier rulings to admit the statements and have a

consolidated trial on an offer of proof that both defendants would testify. The trial court had previously stated that it decided not to grant separate trials based on the offer of proof that both defendants would testify, but acknowledged that trial strategies often change during the course of trial. Both defendants ultimately refrained from testifying.

Defendants now argue on appeal that they were denied a fair trial because the trial court denied their motions for separate trials or separate juries, and then allowed the same jury to hear each of their custodial statements. We agree. The decision whether to grant separate trials is within the discretion of the trial court and we will not reverse absent an abuse of that discretion. *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995); MCL 768.5. Additionally, this issue presents a constitutional question concerning the Confrontation Clause, which we review de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000); US Const, Am VI; Const 1963, art 1, § 20.¹

MCR 6.121(C) mandates the severance of trials in certain situations. The rule provides that “[o]n a defendant’s motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.” A trial court is only required to grant separate trials under MCR 6.121(C) “when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced by a joint trial and that severance is necessary to remedy the prejudice.” *People v Hana*, 447 Mich 325, 346; 524 NW2d 682, amended 447 Mich 1203; 524 NW2d 710 (1994). This standard can be satisfied where defendants argue conflicting defenses that are not merely inconsistent, but also mutually exclusive or irreconcilable. *Id.* at 349.

¹ Although the trial court made its ruling denying severance based upon an offer of proof that both defendants intended to testify, ultimately, neither defendant elected to testify. Accordingly, both defendants were denied the opportunity to cross-examine each other regarding their various statements to the police. The dissenting opinion would affirm on what amounts to a waiver analysis. However, the prosecution does not argue that this issue was waived by defendants both stating in advance of trial that they intended to testify, i.e., both would have been available for confrontation upon cross-examination. A waiver is the intentional relinquishment or abandonment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Any such waiver argument would rest on the premise that a defendant’s constitutional right to confront witnesses may be susceptible to a codefendant’s decision to go back on a stated intention to testify, and we are not aware of any precedents suggesting that approach. Further, we are not aware of any precedents suggesting that a codefendant who expresses an intent to testify can be forced to do so if a trial court relies on that stated intention to allow otherwise inadmissible codefendant testimony, in derogation of that defendant’s right to remain silent and right against self-incrimination. Admittedly, the trial court was apparently led astray by the defendants’ stated intent not to testify. However, the better approach, to assure that their constitutional rights would not be compromised, would have been to proceed with separate trials or separate juries.

In this case, by its own admission, the trial court focused only on the proposed defenses of each defendant in determining that severance was not required. The trial court erred by failing to give sufficient consideration to the prosecutor's intention to offer the custodial statements of each defendant into evidence before the same jury. In *Hana, supra* at 346 n 7, our Supreme Court observed that potentially reversible prejudice requiring separate trials can occur where "evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant," quoting *Zafiro v United States*, 506 US 534, 539; 113 S Ct 933; 122 L Ed 2d 317 (1993). Our Supreme Court also noted that "[e]vidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice." *Hana, supra* at 346 n 7, quoting *Zafiro, supra* at 539.

In *Bruton v United States*, 391 US 123, 135-136; 88 S Ct 1620; 20 L Ed 2d 476 (1968), the United States Supreme Court held that a defendant is deprived of his right to confrontation when his codefendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. *Cruz v New York*, 481 US 186, 187-188; 107 S Ct 1714; 95 L Ed 2d 162 (1987). See also *People v Frazier (After Remand)*, 446 Mich 539, 544-545; 521 NW2d 291 (1994) (Brickley, J.). The Court observed:

In joint trials . . . when the admissible confession of one defendant inculcates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes.' [*Bruton, supra* at 131.]

The Court further stated that "[a] defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant," and that "[t]his prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand." *Id.* at 132.

[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. [*Id.* at 135-136 (citations omitted).]

Additionally, the United States Supreme Court has held that the rule from *Bruton* applies even in the situation where the defendant has also confessed and his unredacted statement is "interlocking" with the codefendant's statement. *Cruz, supra* at 191-194. Writing for the majority, Justice Scalia noted the "devastating" practical effect of codefendant testimony without

cross-examination referenced in *Bruton*. *Id.* at 191. The Court found it “impossible to imagine why there should be excluded from that category [codefendant confessions], as generally not ‘devastating,’ codefendant confessions that ‘interlock’ with the defendant’s own confession.” *Cruz, supra* at 191-192. “[T]he infinite variability of inculpatory statements (whether made by defendants or codefendants), and of their likely effect on juries, makes [the assumption that an interlocking confession will preclude devastation] untenable.” *Id.* at 192, quoting *Parker, supra* at 84 (Stevens, J., dissenting). Justice Scalia reasoned that usually a defendant tries to negate or avoid the consequences of a confession and the admission of a codefendant’s custodial account that corroborates that confession presents a serious obstacle to that strategy. *Id.* at 192. Thus, the Court held that “where a nontestifying codefendant’s confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant’s own confession is admitted against him.” *Id.* at 193 (internal citation omitted).²

Regarding defendant Pipes, the prosecutor concedes that the trial court erred in admitting defendant Key’s statements in the joint trial. Further, with respect to defendant Key, the prosecutor agrees that even though the issue on appeal is framed in terms of the trial court’s error in denying defendant’s motion to sever the joint trial, the “real argument” is that the trial court committed a *Bruton* error by admitting defendant Pipes’ statements in the joint trial. Under *Cruz, supra* at 191, the fact that defendant Key confessed in his second statement to the police does not erase the *Bruton* error.

However, these *Bruton* violations do not automatically require reversal of defendants’ convictions. *People v Banks*, 438 Mich 408, 427; 475 NW2d 769 (1991). Even where the *Bruton* rule is violated, the error may be considered harmless in certain circumstances. *Banks, supra* at 427. Thus, a defendant’s confession “may be considered on appeal in assessing whether any Confrontation Clause violation was harmless.” *Cruz, supra* at 193-194, citing *Harrington v California*, 395 US 250; 89 S Ct 1726; 23 L Ed 2d 284 (1969). If the evidence properly admitted against the defendant is so overwhelming and the prejudicial effect of the codefendant’s statement so insignificant by comparison, the improper admission of the statement is harmless beyond a reasonable doubt. *Banks, supra* at 427. See also *People v Harris*, 201 Mich App 147, 150; 505 NW2d 889 (1993).

In this case, both codefendants were prejudiced by the admission of each other’s unredacted statements. Witnesses did not get a clear look at who was actually responsible for the shooting. There were varying accounts of which vehicles were involved, who was in the vehicles, and which vehicle was the source of the gunfire. In an attempt to exonerate himself,

² The United States Supreme Court’s recent decision in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), further supports barring the use of a nontestifying codefendant’s statement in a joint trial. In *Crawford*, the Court held that out-of-court statements that are testimonial in nature are barred under the Confrontation Clause where the declarant is unavailable, unless the defendant had a prior opportunity to cross-examine the witness. *People v Bell (On Second Remand)*, 264 Mich App 58, 61-63; 689 NW2d 732 (2004).

defendant Pipes implicated defendant Key in all three of his statements to the police. Defendant Key similarly implicated defendant Pipes in his two statements to the police, while additionally admitting his own involvement in the shooting in his second statement. Because defendants gave conflicting statements, the jury had to decide which statements were accurate. Indeed, it appears that the jury was unable to determine the identity of the actual shooter, because neither defendant was convicted of felony-firearm.

Under the circumstances, we conclude that both defendants were, at a minimum, entitled to trials before separate juries, given that the prosecution intended to offer into evidence the statements of each defendant, and that each defendant implicated the other in their own statements. The admission of these unredacted statements at trial violated each defendant's right of confrontation, because neither defendant testified at trial and thus was not subject to cross-examination. Because the properly admitted evidence of guilt was not overwhelming, and because the prejudicial effect of the codefendants' statements against each other was significant by comparison, *Banks, supra* at 427, we are compelled to reverse the convictions of both defendants on this basis and remand for new trials.

To aid the trial court on remand, we address defendants' remaining issues on appeal. Defendant Pipes argues that the trial court erred in admitting investigative subpoena hearing testimony of Miles Scott. We review a trial court's decision to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). But where the decision involves a preliminary question of law, such as whether a rule of evidence precludes admissibility, we review the question de novo. *Id.*

MRE 801(d)(1)(A) provides that a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Here, Scott testified at trial and was available for cross-examination concerning his statement within the meaning of the Confrontation Clause, despite the fact that he claimed to remember nothing. See *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999). Additionally, Scott's trial testimony—where he claimed to remember nothing about the incident or his prior statement—was inconsistent with his investigative subpoena hearing testimony, where he recalled the events in question and implicated defendant Pipes. *Id.* at 281-282. Therefore, we find that the trial court did not abuse its discretion in admitting Scott's investigative subpoena hearing testimony as substantive evidence under MRE 801(d)(1)(A).

We note defendant Pipes' argument that the trial court erred in admitting the testimony under MRE 613(b), which allows a witness to be impeached by extrinsic evidence of a prior inconsistent statement. However, defendant did not object to the admission of the testimony on this basis at trial, and "objections to admissibility not properly raised at trial cannot be later asserted on appeal." *People v Kilbourn*, 454 Mich 677, 685; 563 NW2d 669 (1997). We also note defendant Pipes' argument that the trial court erred in admitting the testimony by concluding that Scott's prior testimony was trustworthy. However, the element of trustworthiness is applicable when hearsay is admitted under MRE 803(24), the residual hearsay exception, and the trial court was not required to find that the prior testimony was trustworthy in order to admit it under MRE 801(d)(1)(A). Because, as noted above, the trial court properly admitted the testimony as substantive evidence under MRE 801(d)(1)(A), we need not decide if

the evidence was alternatively admissible under MRE 803(24). Accordingly, defendant Pipes would not be entitled to relief on this issue.

Defendant Key argues that the prohibition against double jeopardy barred his retrial where, at the first trial, he was provoked into moving for a mistrial after a police officer disclosed that he had failed a polygraph examination. US Const, Ams V, XIV; Const 1963, art 1, § 15. A constitutional double jeopardy challenge presents a question of law that we review de novo. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002). When a mistrial is declared, retrial is permissible under double jeopardy principles where the defendant requested the mistrial and the mistrial was caused by innocent conduct on the part of the prosecutor or by factors beyond his control. *Id.* at 215; *People v Echavarria*, 233 Mich App 356, 363; 592 NW2d 737 (1999). Stated another way, where a defendant requests a mistrial, retrial is not barred unless the prosecutor has engaged in conduct that was intended to provoke or goad the request for a mistrial. *Lett, supra* at 215.

We agree with the trial court that the police officer's comments at defendant Key's first trial were made inadvertently. There is nothing in the record to suggest that the prosecutor sought to elicit testimony from the police officer regarding the results of defendant Key's polygraph examination, thereby provoking defendant Key into requesting a mistrial. Indeed, defendant Key never made such a claim when moving for a mistrial. Defendant Key's retrial did not violate double jeopardy principles because the mistrial was granted at his request, and the mistrial was caused by factors beyond the prosecutor's control, namely, the police officer's unsolicited reference to defendant Key's polygraph results. *Echavarria, supra* at 363.

Defendant Key next argues that there was insufficient evidence to support his conviction of first-degree murder. We disagree. In reviewing the sufficiency of the evidence, we view the evidence de novo in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The elements of premeditation and deliberation require sufficient time to allow the defendant to take a second look, and may be inferred from the circumstances surrounding the killing. *Id.* Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. *Id.*

We apply these principles here by examining the evidence against defendant Key apart from the improperly admitted custodial statements made by defendant Pipes. The prosecution presented evidence that defendant Key was involved in an argument with Close and Smith regarding their respective drug territories, and believed that they were involved in an earlier incident in which gunshots were fired at a vehicle that defendant Key was known to drive. In his own statement, defendant Key admitted his involvement in the shooting as revenge for the earlier shooting incident. During the shooting, several gunshots were fired in the direction of a house where two people were outside on the front porch, one person was in the yard, and several others were inside. One person on the front porch dove into the house to avoid being shot. Viewing

this evidence in a light most favorable to the prosecution, there was sufficient evidence from which a rational trier of fact could find that the essential elements of first-degree murder were proven beyond a reasonable doubt.

Defendant Key next argues that the trial court erred in admitting a tape recording of a series of 911 calls made following the shooting. We note, initially, that the contents of the 911 tape were not transcribed into the record, and despite requests from this Court, the prosecution has failed to produce the tape recording of the 911 calls. MCR 7.210(C) provides that once a claim of appeal is filed, the party possessing any exhibits offered into evidence, here the prosecution, must file them with the trial court absent a stipulation or order to the contrary. *People v Wilson (On Rehearing)*, 96 Mich App 792, 796; 293 NW2d 710 (1980). While an incomplete lower court record can jeopardize a criminal defendant's right to appeal, "not every gap in the record on appeal requires reversal of a conviction." *Id.* at 797. "When the surviving record is sufficient to allow evaluation of the appeal, the defendant's right is satisfied," and "[w]hether a record is sufficient in a particular case will of course depend upon the questions that must be asked of it." *Id.*

Here, defendant Key claims that the trial court abused its discretion in admitting the 911 tape into evidence because it was introduced solely to inflame the passions of the jurors, was cumulative of other evidence presented at trial, and any probative value was substantially outweighed by the danger of unfair prejudice under MRE 403. We review de novo preliminary questions of law, such as whether a rule of evidence precludes admissibility, and we review the trial court's ultimate decision to admit the evidence for an abuse of discretion. *McDaniel, supra* at 412.

Although the record does not contain the 911 tape or a transcription of it, our review of the record reveals that the trial court determined that although its contents were generally cumulative to the in-court testimony of witnesses to the shooting, the potential prejudice or cumulative nature did not outweigh its probative value. We conclude that the record presents justification for the trial court's decision, and thus find that the trial court did not abuse its discretion in admitting the 911 tape. See *People v Schmitz*, 231 Mich App 521, 534-535; 586 NW2d 766 (1998).

We reverse and remand. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Stephen L. Borrello